Supreme Court, U.S.
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No. 99-161

In the
Supreme Court of the United States
October Term, 1999

Chad Weisgram, et al.

and

State Farm Fire & Casualty Insurance Company,
Petitioners,

vs.

Marley Company, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. *Did the Eighth Circuit correctly apply North Dakota law regarding plaintiffs' burden of proof?*

2. *Was the Eighth Circuit's remand to the district court for entry of judgment as a matter of law in harmony with its prior decisions and decisions of other circuits?*

3. *Did the Eighth Circuit give appropriate deference to the rulings of the district court?*

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STATEMENT OF THE CASE

Introduction and Summary of Argument

The petition should be denied. There is no need to grant Certiorari because the law is clear, and this case is in harmony with it. Contrary to the assertions in petitioners' brief, the Court of Appeal's holding follows established Eighth Circuit law and it is entirely consistent with this Court's pronouncements in *Daubert, General Electric Company v. Joiner, and Kumho Tire*. State Farm and Weisgram were wrong about the law when they informed the trial court and the Eighth Circuit that testimony on engineering issues falls outside the scope of *Daubert*. This Court's decision in *Kumho Tire* confirmed that the Eighth Circuit had been correct all along in its series of cases holding that *Daubert's* reliability criteria do indeed apply to engineers' and technical experts' opinions in product liability cases.

Contrary to the petitioners' arguments, the Eighth Circuit correctly cited and applied North Dakota statutory and case law regarding the plaintiffs' burden of proof in a product liability case and correctly found a complete failure of proof on the issues of product defect and causation, thus entitling Marley to judgment as a matter of law. The appellate court correctly determined that there was not substantial evidence in the record to support the verdict even when the evidence was viewed in the light most favorable to the plaintiffs. The Eighth Circuit did follow its own valid precedents and those of other circuits in determining that judgment as a matter of law is the appropriate disposition where there is not sufficient evidence to support a jury verdict and where the plaintiffs had their day in court. Finally, the Eighth Circuit did extend appropriate deference to the trial judge, but found that the trial court had abused its "admittedly broad" discretion when it admitted "rampant speculation" from plaintiffs' experts.

In summary, the appellate court carefully followed the law of the Eighth Circuit and of this Court in determining that the trial court judgment was wrong and could not stand. There is no reason to grant the petition for Certiorari.

Summary of Facts and Procedural History

Bonnie Weisgram died of smoke inhalation in her home in Fargo. The investigating fireman, Freeman, immediately blamed the heater in the entryway, but he was not aware of critical data that pointed inescapably to the couch in the living room as the source of the fire. A later autopsy revealed Bonnie Weisgram died of carbon monoxide poisoning several hours before the fire in the entryway started. Her blood alcohol level at the time of death was .153. The carbon monoxide gas could only have come from a smoldering fire in the couch. The couch fire could only have been ignited by a smoldering ignition source. The only smoldering ignition source in the house was a cigarette.

At the time of her death, Bonnie Weisgram was divorced and had two adult sons, Chad and Ryan Weisgram. Chad Weisgram and State Farm (the insurer of the Weisgram home) sued Marley Electric Heating Company, a division of Marley Company, and the parent company, United Dominion Industries, Inc. (Marley), alleging negligence and strict liability.

State Farm's expert, Dolence, examined the heater and found no evidence of defect or malfunction. But Weisgram's and State Farm's product liability theory against the heater manufacturer depended upon the fire starting in the entryway, so Dolence constructed an elaborate theory that called for two simultaneous and unrelated failures in the heater,[1] blockage of

[1] Dolence said the thermostat failed, followed immediately by the failure of the backup high limit control. Judge Bowman, writing for the panel majority, described Dolence's theory: ". . . he opined, after fifteen

the heater by a rug, and ignition of vapors under the floor. Dolence had no evidence that these things occurred, so he simply said that they did. Another expert, Lazarowicz, without evidence, and without any experience in studying or testing heaters or thermostat contacts, said that the thermostat contacts in the heater welded together and that serrations in the contacts were a design defect.

In an extensive pretrial motion, Marley asked the district court to strike the expert testimony based on Rule 702 and on this Court's ruling in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The essence of the motion was that the experts ought not be allowed to testify because their opinions were not supported by fact, science, testing, published studies, or anything else. During the pretrial hearing on the motion, the district court acknowledged its duty to act as a gatekeeper but denied the motion, based on its mistaken impression that *Daubert* only applied to "new science" and on its mistaken belief that "bare assertions *are* the proper subject of expert opinions."

Marley counsel advised the district court that the Eighth Circuit had not given *Daubert* so narrow a reading, citing *Peitzmeier v. Hennessy Industries, Inc.*, 97 F.3d. 293, 297 (8th Cir. 1996), in which the Eighth Circuit had clearly settled the issue and had applied *Daubert* to exclude plaintiff's engineer's theories on the ground that the theories had not been subjected to testing, peer review, or the other indicia of reliability described in *Daubert*.

In its pretrial *Daubert* motion, Marley set forth at length the reasons why the testimony offered by Dolence and Lazarowicz did not rest on reliable scientific foundation. Not

years of operating, without incident, both the thermostat and the high limit control suddenly and simultaneously 'did not function' to shut the heater off." *App. A-12.* Dolence admitted he had "no idea what caused the thermostat to fail," and he could not determine what caused the high limit control to fail. *Id.*

only did these experts lack the educational background, training, and specialized experience — Dolence on heater design and failure analysis, and Lazarowicz on heater design and evaluation of electrical contacts — but the opinions were themselves completely devoid of any scientific support. Dolence admitted he had not personally conducted any testing and that he was unaware of any studies done by others in support of his theory that a 500-watt heater blocked by a rug could cause a fire by igniting vapors under a fifteen-year-old floor.

Similarly, Lazarowicz admitted he had conducted no testing himself and he proffered no testing by others or any other support for his conclusion that silver contacts in the thermostat had welded then later "unwelded."[2] Lazarowicz had admitted in deposition he was not an expert in contact theory or design and that he did not possess the qualifications to make any statements at all about the condition of the contacts. He admitted he had never designed any contacts and that he had no professional experience in testing them. The district court denied Marley's pretrial *Daubert* motion and allowed all plaintiffs' experts' theories to come in.

Marley had not included the fire investigator, Freeman, in its *Daubert* motion because State Farm and Weisgram had listed Freeman in the magistrate's pretrial order only as a fact witness, and not as an expert. At trial, however, over Marley's repeated objections that Freeman had been declared as a fact

[2] The contacts were no longer "welded" when the heater was examined after the fire. Marley's heater expert, Phy, a company engineer with twelve years of experience examining and testing heater components and electrical contacts, examined the remains of the Weisgram heater. Phy reported that the contact points were "extremely clean and free of pitting and metal transfer," with no sign of welding or sticking. The condition of the contacts, Phy said, proved the contact points were open and that the heater was not carrying current at the time of the fire. Plaintiffs did not challenge Phy's qualifications or his expertise.

witness only, the district court permitted Freeman to opine as an expert on virtually every issue relevant to plaintiffs' theory of the case, including that the heater had malfunctioned and "run away" and that "it had enough heat to radiate over and ignite that sofa."

The case should not have gone to the jury, but did. Marley moved for a directed verdict at the close of plaintiffs' case and again at the close of all the evidence on the ground that the plaintiffs had failed to meet their burden of proof of defect or causation. The trial court denied the motions and the jury returned a verdict for the plaintiffs. After the trial court denied Marley's post-trial motions for judgment as a matter of law and for a new trial, Marley appealed to the Eighth Circuit.

Stating that it had "very carefully" reviewed the "entire transcript of the trial," the Eighth Circuit concluded that neither Freeman nor Dolence were qualified under Rule 702 to testify that the heater was defective, and that Lazarowicz's testimony about the defective thermostat contacts and placement of the high limit control was not sufficiently reliable under Rule 702 to have been admitted in evidence. Finding that these witnesses offered the only evidence of defect and that their testimony had a "substantial influence on the jury's decision," the appellate court held that Marley's post-trial motion for JAML should have been granted. The Eighth Circuit vacated the judgment for the plaintiffs and remanded the case to district court with instructions to grant Marley judgment as a matter of law. After Weisgram and State Farm's petition for rehearing and rehearing en banc was denied, this petition for Certiorari followed.

Petitioners' Recitation of the Evidence is Misleading

Respondents take issue with some of the points in petitioners' statement of the case.[3] Petitioners' statement that a hole was found "*under* the Marley heater" is inaccurate and misleading. When Freeman first noticed the heater, it was already off the wall where it had been mounted. The hole was located "*in front of* the south entryway wall," as it was accurately described by the Eighth Circuit in its opinion. *App. A-3.*

At pages 2-3 of the brief, petitioners reiterated Freeman's and Dolence's testimony that a rug was "pushed onto" and "covered" a portion of the heater. This is misleading, not only because it does not address the Eighth Circuit's explicit concern that Dolence's testimony about the rug's position was pure "conjecture," *App. at A-11,* but also because Dolence admitted at trial that no witness had ever seen a rug blocking the heater and that Freeman had told him on the same day he investigated the fire that he saw "nothing blocking that heater." The notion that a rug was blocking the heater was nothing more than a fabrication by Dolence.

At page 4 of the brief, petitioners described Dolence's *theory* of the blocked heater igniting vapors under the floor as though it were *fact*. Again, this is misleading. The appellate court called these very statements by Dolence "rank speculation." *App. A-12.*

At page 4 of the brief, petitioners described their theory of design defect. They simply summarized again Lazarowicz's observation that there were serrations on the thermostat contacts and his testimony that the thermostat contacts did not "mate squarely" and welded together. But petitioners' discussion on these points misses the point.

[3] The facts as set forth in the Eighth Circuit's opinion in this case, starting at page A-2 of the petitioner's appendix, are correct.

Petitioners did not even attempt to respond to the Eighth Circuit's point: that Lazarowicz had opined to the jury about defects in the heater's design while knowing "practically nothing" about this or any other heater. Petitioners have not tried to argue that Lazarowicz was actually qualified in heater design or that his opinions about the design were actually reliable. Even in view of the Eighth Circuit's exposure of Lazarowicz's total lack of experience, education, or study that would qualify him to testify about the heater's operation or design, petitioners have not come forward with any facts in the record bolstering Lazarowicz's credentials. The Eighth Circuit was correct: Lazarowicz's opinions amounted to no more than "subjective belief or unsupported speculation." *App. A-15.*

Petitioners' contention on page 5 of their brief that Marley's "own testing" proved the design defect in the high limit control is, once again, misleading. In reality, Dr. Ogle, an independent consultant retained by Marley, testified that his testing program conducted on an exemplar heater demonstrated that the high limit switch cycled exactly as it was designed to cycle and that the over-all temperatures seen by the heater were far too low to pose a fire hazard either to a rug or to adhesive under the floor. More to the point, petitioners failed to answer the Eighth Circuit's observation that it was Dolence's own temperature tests that established there was no defect in the heater's design. *App. A-12.* Dolence had checked the temperatures generated by the same exemplar heated that Ogle later tested and found they did not pose a danger. *Id.* Dolence tried, but could not make this 500-watt heater overheat, even at maximum output. *Id.* Based on his own temperature test results, Dolence admitted in deposition and at trial that the Marley heater was not defective in design in any respect. *Id.* Dolence never tested his "run away" heater theory. *Id.* Marley's expert did and proved it false. Dr. Ogle, a highly-credentialed chemical

engineer, testified the Marley heater was not capable of running away.[4]

[4] Plaintiffs challenged neither Dr. Ogle's qualifications nor the scientific methodology employed in his testing program.

REASONS FOR DENYING THE PETITION

The Eighth Circuit Correctly Applied North Dakota Law Regarding Plaintiffs' Burden of Proof

Petitioners, citing nothing, argued at page 8-10 of their brief that the Eighth Circuit refused to follow North Dakota Supreme Court case law on plaintiffs' burden of proof. Again citing nothing, they ask this Court to intercede in the case to ensure that "state substantive right are not trampled upon." The argument is based on a false premise: it incorrectly assumes that the Eighth Circuit failed to address "substantial circumstantial evidence" of the "defective condition" of the heater. In reality, there was no such circumstantial evidence and petitioners have not pointed to any in their brief. Incredibly, they seem to be suggesting that this Court should just *assume* Weisgram and State Farm proved their case by circumstantial evidence.

The Eighth Circuit did correctly cite and apply North Dakota law regarding a plaintiff's burden of proof in a product liability case. It expressly followed the law set forth in *Endresen v. Scheels Hardware & Sports Shop, Inc.* 560 N.W.2d 225, 229 (ND 1997) and in the North Dakota Product Liability Act at § 28-01.3-06 N.D.Cent.Code. Both the *Endresen* court and the North Dakota Product Liability Act require that a product actually have a defect or be in a defective condition at the time of its sale to support a product liability action.[5] Petitioners were not specific in their brief about exactly how the Eighth Circuit misapplied North

[5] § 28-01.3-06 N.D.Cent.Code. states: "no product may be considered to have a defect or to be in a defective condition, unless at the time the product was sold by the manufacturer or other initial seller, there was a defect or defective condition in the product which made the product unreasonably dangerous to the user or consumer."

Dakota law. Since their argument lacks both substance and support, it should be rejected.

In reality, this is not an appropriate case for application of the circumstantial evidence rule. The Eighth Circuit said in *Lindsay v. McDonnell Douglas Aircraft Corp.*, 460 F.2d 631 (8th Cir. 1972) that courts would prefer in a strict liability case to "have proof of a specific defect causing the accident" unless that is not possible because the evidence has been *destroyed. Id. 638.* The evidence in this case was *not* destroyed, but was merely damaged due to exposure to an external fire. Dolence inspected the heater components and testified that he was not able to identify a particular design our manufacturing defect or malfunction, but merely said the thermostat and high limit control *must* have failed. *Weisgram v. Marley Co.*, 169 F.3d 514, 519-20 (8th Cir. 1999); *App. A-12-13.* This is not called "circumstantial evidence" of a "defective condition." This is called "rank speculation" by an expert. *Id.*

Plaintiffs have not explained why this Court should even discuss permitting proof of a defect by circumstantial evidence in a case where it is not possible to exclude an alternative potential cause of the fire. In *Endresen, supra*, the North Dakota Supreme Court said proof by circumstantial evidence is appropriate only where the evidence *"excludes equally reasonable inferences of other causes for which the defendant is not responsible."* (Emphasis added) *Id.* 232. In this case, Marley introduced uncontroverted expert testimony that the fire was caused by cigarette ignition of the couch, which was partially destroyed by the fire. The Eighth Circuit correctly noted that neither the Weisgram family nor State Farm took any action to preserve the couch for inspection or testing by Marley, but discarded it before commencing suit. *Weisgram, supra*, 519, fn. 5; *App.* A-10. Ironically, petitioners' brief at page 1-2 contains an admission that conclusively proves Marley's cigarette ignition theory of the

case was correct. Petitioners report that Freeman found "no evidence of a flaming fire" in the couch, indicating only a *smoldering* fire. Marley's fire reconstruction expert, Dr. Ogle, presented unrefuted scientific evidence that the *smoldering* fire in the couch could only have been ignited by a smoldering ignition source, and the only smoldering ignition source in the house was a cigarette. Plaintiffs could not and did not present a shred of a evidence to contradict this expert opinion.

Under these circumstances, since the evidence did not exclude equally reasonable inferences of another cause of the fire for which the defendant was not responsible, the North Dakota Supreme Court has said that proof by circumstantial evidence is not appropriate. *Endresen, supra*, 232.

Granting Judgment as a Matter of Law Was Proper

Petitioners argued that the Eighth Circuit's holding in *Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357 (1973) and decisions from four other circuits require a new trial, not a judgment as a matter of law, when expert evidence is erroneously admitted. But *Midcontinent* and the other cases cited in petitioners' brief are not on point, and the Eighth Circuit majority correctly followed Eighth Circuit precedents in *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1108 (8th Cir. 1996) and in *Omaha Indian Tribe v. Wilson*, 575 F.2d 620, 640 (8th Cir. 1978).

In *Midcontinent*, the trial court granted JNOV when it concluded after a jury verdict that it had erred in admitting certain expert testimony. Part of the appellate court's rationale for determining that JNOV was not appropriate in that particular case was its concern that the plaintiff, if forewarned, might have supplied "further foundation or even totally different evidence." *Id.* 359. These circumstances are clearly distinguishable from the facts in the case at hand.

There is no suggestion in this case that the plaintiffs had any additional foundation or further proof that they could have introduced to bolster their theory that a heater defect caused the fire. To the contrary, as the Eighth Circuit majority panel pointed out in footnote two of the opinion, Weisgram and State Farm had their day in court.[6] No litigant is entitled to more than that. There is no reason to reopen discovery here. The Eighth Circuit reached the same conclusion when it granted judgment as a matter of law to the defendant in *Peitzmeier v. Hennessy, supra*, after the trial court determined plaintiff's expert testimony was inadmissable. Similarly, in *Wright v. Willamette, supra*, the Eighth Circuit reversed the trial court's denial of JMAL after it determined the trial court had admitted improper expert testimony.

As the Eighth Circuit panel majority rightly pointed out, Weisgram's and State Farm's entire theory was based on "rampant speculation," not substantial evidence. Under established Eighth Circuit law, expert speculation cannot support a judgment. *Omaha Indian Tribe, supra*, 640-46. This case should never have gone to the jury, but did. By rights, the trial court should have granted Marley's motion for a directed verdict at the close of plaintiffs' case on the stated ground that plaintiffs had a complete failure of proof as to a design defect and as to any mechanism by which this 500-watt heater, even if it had continued to run, could have "run away" and caused a fire.

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[6] The Court of Appeals rejected any contention that it was required to remand for a new trial to give plaintiffs the opportunity to reopen discovery and identify additional witnesses: "We can discern no reason to give the plaintiffs a second chance to make out a case of strict liability . . . (citations omitted) *This is not a close case.* The plaintiffs had a fair opportunity to prove their claim and they failed to do so." *Weisgram, supra*, at fn. 2. (Emphasis added).

The trial court had another opportunity to grant a directed verdict at the close of all the evidence when Marley again pointed out that the plaintiffs had failed to meet their burden of proof because neither Dolence nor Lazarowicz had provided an explanation of the cause of the fire. Failing that, the trial court should have granted Marley's post-trial motion for JMAL, when Marley demonstrated that plaintiffs entire case was based on unsupported expert speculation, which has never been allowed to support a verdict in the Eighth Circuit before or after *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993) ("The word 'knowledge' connotes more than subjective belief or unsupported speculation.") Marley informed the trial court in its motion for JMAL that the Eighth Circuit's pre-and post-*Daubert* case law has never allowed experts to speculate and has always held that expert speculation is not substantial evidence to support a judgment.

The trial court's denial of JMAL was a legal question that was fully reviewable in the Eighth Circuit based on the same standard that was before the district court: whether there was sufficient evidence to support the verdict. *McKnight v. Johnson Controls, Inc.*, 36 F.3d 1396, 1400 (8th Cir. 1994). Under the circumstances of this case, *Midcontinent* is not the relevant precedent. The Eight Circuit did not simply "excise" the expert opinion as the trial judge in *Midcontinent* did in reaching its conclusion that there was no substantial evidence to support the verdict. Rather, after "carefully reviewing" the "entire record," the panel majority took pains to explain that plaintiffs' entire proof consisted of no more than "subjective belief and unsupported speculation," which it said was insufficient to prove the heater defective under the North Dakota law of strict products liability. *Weisgram, supra*, 521-22; *App.* A-15-17. In this respect, *Omaha Indian Tribe, supra*, and *Wright v. Willamette, supra*, provided ample Eighth Circuit precedent for granting JMAL. In *Omaha Indian Tribe*, which was decided after *Midcontinent*, the

Eighth Circuit vacated and remanded to the trial court with directions to enter judgment in favor of the tribe after determining that the land owners' experts' opinions were mere speculation, not "substantial evidence." *Id.* 646.

Petitioners cited a Sixth Circuit decision, *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1343-44 (6th Cir. 1992), in support of their argument that a new trial, not JMAL, is the appropriate remedy when evidence is erroneously admitted at trial. Petitioners neglected to point out, however, that, in a recent case, the Sixth Circuit, like the Eighth Circuit, reversed a jury verdict for the plaintiff and remanded for an entry of judgment as a matter of law in favor of the defendant where the appellate court found the plaintiff could not sustain its burden of proof in the absence of expert testimony which had been erroneously admitted. In *Smelser v. Norfolk Southern Railway Co.*, 105 F.3d 299, 302-3 (6th Cir. 1997), the appellate court held that the trial court failed to determine whether plaintiff's expert's training and qualifications related to the subject matter of his proposed testimony. Before trial, the district court denied Norfolk's motion in limine challenging the expert's proposed testimony on a seatbelt defect issue. After the jury returned a verdict for the plaintiff, Norfolk appealed. The Sixth Circuit reversed and remanded for entry of judgment as a matter of law for Norfolk, saying that if the trial court had adequately performed its gatekeeping function, the expert's testimony would not have been admitted. *Id.* at 303. The Sixth Circuit concluded that even though plaintiff's expert was a Ph.D. biomechanic, his opinions failed to qualify as scientific knowledge under Rule 702 because he failed to perform appropriate tests to verify his conclusion that the seatbelt was defective, and his opinion testimony about causation exceeded his expertise in biomechanics. Without plaintiff's expert's testimony, the Sixth Circuit concluded the plaintiff failed to meet his burden of proof and the trial court should have granted Norfolk's

motion for a directed verdict. It remanded the case for entry of JMAL.

Similarly, under the circumstances of this case, the Eighth Circuit acted well within its discretion in granting JMAL to Marley.

The Eighth Circuit Gave Appropriate Deference to the Rulings of the District Court

Contrary to petitioners' suggestion at page 11 of the brief, the Eighth Circuit did not conduct a *de novo* review of plaintiffs' experts' testimony. Instead, the Eighth Circuit explicitly and repeatedly stated that it was indeed applying the abuse-of-discretion standard to the district court's evidentiary decisions, as required by this Court's decision in *General Electric Co. v. Joiner*, 118 S.Ct. 512, 519 (1997) and by previous rulings of the Eighth Circuit. See, e.g., *Peterson v. City of Plymouth*, 60 F.3d 469, 475 (8th Cir. 1995). Even though the Eighth Circuit accorded due deference to the trial court, the majority panel nevertheless said eight times that the trial court abused its admittedly broad discretion when it allowed "blatant speculation" from Freeman, "rank speculation" from Dolence, "unsupported speculation" from Lazarowicz, and "rampant speculation" from all three experts about 'how the 'runaway' heater might have ignited the fire." *Weisgram, supra*, 518-21; *App. A-9-16.*

The Eighth Circuit's opinion is entirely in harmony with this Court's recent decision in *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999). *Kumho Tire* clarified that *Daubert's* gatekeeping obligation applies to all expert testimony and reiterated *Joiner's* holding that abuse of discretion is the appropriate standard of review. The Eighth Circuit explained that it was following *Joiner* precisely when it concluded that the nexus between Lazarowicz's observations of the contacts and his conclusion that the heater was defective was not

scientifically sound. Finding "simply too great an analytical gap between the data and the opinion proffered," the Eighth Circuit concluded that the trial court abused its discretion in allowing the testimony. *Weisgram, supra*, 521; *App.* A-16, citing *Joiner* at 118 S.Ct. 512, 519. Since the Eighth Circuit followed *Joiner*, it follows that it did extend appropriate deference to the trial judge. *Kumho Tire* requires nothing more.

Kumho Tire does not require, as petitioners seem to be suggesting in their brief, a rubber stamp of every trial court ruling admitting or excluding expert testimony. As Justice Scalia noted in his concurring opinion in *Kumho Tire*, "trial court discretion in choosing the manner of testing expert reliability — is not discretion to abandon the gatekeeping function." *Kumho, supra*, 1179.

When an able and experienced trial court abuses its "admittedly broad" discretion by admitting "rampant speculation" by experts, it is incumbent upon the appellate court to so hold — and to reverse where, as here, the testimony influenced the jury. There would be no need for appellate review of evidentiary decisions if trial courts were free to admit expert opinions without first determining if the expert was reliable and without first scrutinizing the opinion for some indicia of reliability.

CONCLUSION

The trial court did abandon its gatekeeping function in this case. The Eighth Circuit majority was right to hold that this was an abuse of discretion. The Eight Circuit had it right when it said this was not a close case. The jury verdict could not stand and judgment as a matter of law was the appropriate remedy. Since the Eighth Circuit's holding followed the valid precedents of this Court and those of the Eighth Circuit, there is no conflict and no reason for granting petitioners' writ of Certiorari.

The Petition for Certiorari should be denied.

Respectfully submitted,

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